BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 34662

PETITION FOR RECONSIDERATION
OF THE DISTRICT OF COLUMBIA

The District of Columbia ("the District"), pursuant to 49 C.F.R. § 1115.3(a), hereby files its Petition for Reconsideration of this Honorable Board's Decision of March 14, 2005 in this matter ("Decision").

A petition for reconsideration will be granted on a showing of new evidence or changed circumstances, or material error. *Id*. § 1115.3(b). The District avers that the Decision contained a number of material errors, including insufficient (or no) weight given to controlling precedent, and was incomplete in several aspects.

An agency decision is "arbitrary and capricious" if it "entirely failed to consider an important aspect of the problem." *New York Cross Harbor R. v. STB*, 374 F.3d 1177, 1181 (D.C. Cir. 2004) (*quoting Motor Vehicle Mfrs. Assn. v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). Additionally, an agency acts irrationally if it "reverses its position in the face of a precedent it has not persuasively distinguished . . . ." *Louisiana Public Serv. Comm'n v. FERC*, 184 F.3d 892, 897 (D.C. Cir. 1999).

The Decision Virtually Ignores the District's Arguments.

The Court of Appeals of the District of Columbia Circuit has rejected an STB decision that "ignored" the interests of one party, and accepted "hook, line, and sinker" the interests of the

opposing parties. *New York Cross Harbor*, 374 F.3d at 1184 (STB decision vacated and remanded because of Board's "failure to balance the competing interests").

Here, the Decision almost completely ignores the substantial interests of the District in protecting its citizens from the acknowledged threat of terrorism, instead appearing to adopt unquestioningly the position of the railroad industry and the United States Department of Transportation ("USDOT"). The Decision discusses almost exclusively the concerns of the railroad industry, the shipping industry, the "producers and users of hazardous materials," and three individual members of Congress. Decision at 1 & nn.2–4.

There is almost no reasoned discussion of the District's police-power argument. Worse, the Decision purports to discuss only a legal issue, and "neither discovery nor further evidentiary proceedings are necessary." *Id*. at 6. Notwithstanding this conclusion, the Decision repeatedly discusses how the District's Terrorism Prevention Act ("TPA") "unreasonably burdens" interstate commerce. *Id*. at 10, 11. This suggests either that all non-federal laws are preempted that have *any* effect on interstate commerce (which is *not* the test under the law), or that the Board considered the effects of the law as alleged by CSXT, without allowing the District to present its own evidence or counter CSXT's. Either conclusion is legal error. In order for the Board to rule on the "reasonableness" of the District legislation's purported impact on interstate commerce, it must *a priori* consider the facts alleged in support of that conclusion. Otherwise, the Board is attempting to interpret the TPA in a vacuum.

The facts elucidated in the limited record at the U.S. District Court reveal that, at most, CSXT has shown only a *de minimis* burden on its own operations, and virtually none at all on interstate commerce.[1] To the extent the Board concluded otherwise, the District asserts error.

The Board itself has repeatedly noted that "individual situations need to be reviewed individually to determine the impact of the contemplated action on interstate commerce." *Borough of Riverdale—Petition for Declaratory Order*, STB Fin. Dkt. No. 33466, 2001 STB LEXIS 179 (Feb. 27, 2001), at *2; *Green Mountain Railroad Corp.—Petition for Declaratory Order*, STB Fin. Dkt. No. 34052, 2002 STB LEXIS 322 (May 28, 2002), at n.9 (same); *Joint Petition for Declaratory Order—Boston & Maine Corp.*, STB Fin. Dkt. No. 33971, 2001 STB LEXIS 435 (May 1, 2001), at *20 (determination of whether non-federal regulations unreasonably burden interstate commerce "is a fact-bound question.").

Thus, it would appear that the Board accepted CSXT's (and others') factual allegations without allowing the District to present its own evidence or rebuttal evidence, contrary to Board precedent.

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[1] According to the Complaint before that court, CSXT alleged that the TPA could affect 11,400 of CSXT's cars per year, out of over 7,000,000 total carloads of freight and about 500,000 carloads of hazardous materials. Complaint ¶¶ 7, 67. Before this Board, however, CSXT originally alleged that the Act would affect 10,500 loaded and empty cars. CSXT Petition at 9. The deposition of CSXT's affiant revealed that the "burden" alleged is actually *higher* than the true "burden," and the number of rail cars requiring rerouting is *lower* than that alleged (because plaintiff's initial numbers failed to take into account the voluntary rerouting). Deposition of John M. Gibson, Jr., dated Mar. 3, 2005 ("Gibson Depo.") at 105 (excerpt attached). Moreover, calculations based on CSXT's discovery responses indicate that the District law might require the rerouting of just 2,313 cars annually, which represents just 0.03 % of CSXT's annual traffic, assuming plaintiff could not obtain any permit under the law (in which case that number would be reduced even further). Declaration of David J. Shuman, dated Mar. 14, 2005 ("Shuman Decl.") ¶ 23d (copy attached).

The Decision Ignores or Fails to Adequately Distinguish Relevant Precedent.

The Decision cites a number of federal circuit cases and STB cases to support its result, but it fails (entirely or substantively) to address a number of cases—including the Board's own—which reach the opposite conclusion.

The Decision makes the broad assertion that "[e]very court that has examined the statutory language has concluded that the preemptive effect of § 10501(b) [of the ICCTA] is broad and sweeping, and that it blocks actions by states or localities that would impinge on the Board's jurisdiction or a railroad's ability to conduct its rail operations." Decision at 7 (citations omitted). But that broad assertion is incorrect. In *Tyrrell v. Norfolk Southern Ry. Co.*, 248 F.3d 517 (6th Cir. 2001), the Sixth Circuit reversed a trial court decision which had found an Ohio law preempted by the Interstate Commerce Commission Termination Act of 1995 ("ICCTA"), *codified as amended at* 49 U.S.C. §§ 701 *et seq*. (2005). The Sixth Circuit found that the trial court had erroneously preempted a state law that "touches upon an economic area regulated under the ICCTA[,]" but was otherwise "saved" from preemption by the FRSA. *Id*. at 522. The Sixth Circuit held that Congress' intent was for the ICCTA and the FRSA to be construed *in pari materia*, and it was thus error for the trial court to preempt the state law solely on the basis of the ICCTA. *Id*. at 523 (while agencies have joint responsibility for promoting rail safety, FRA exercises primary authority over rail safety matters while STB handles "economic regulation and environmental impact assessment.") (footnote omitted).

Similarly here, a number of federal statutes are implicated (including the Hazardous Materials Transportation Act, 49 U.S.C. §§ 5101–5127, and the Federal Railroad Safety Act, *codified as amended at* 49 U.S.C. §§ 20101 *et seq*.), and the Board's determination to issue a ruling "arbitrarily pigeonhole[s] preemption analysis of state rail law under the ICCTA." *Id*.

Thus, the Board's analysis in the Decision could lead to the erroneous conclusion that "ICCTA preemption precludes non-preemption under FRSA" *Id*.[2]

Here, the TPA was enacted to protect the District's residents and visitors from an acknowledged threat. It is a security regulation, and *Tyrrell* determined that federal preemption may not be found solely on the basis of the ICCTA. "As the [local] regulation has a connection with rail safety based on its terms, the safety benefits of compliance, and its legally recognized purpose, FRSA provides the applicable standard for assessing federal preemption." *Id*.; *Borough of Riverdale*, *supra*, at n.4 ("[S]ection 10501(b) does not preempt valid safety regulation under the [FRSA]."). *See also Iowa, Chicago & Eastern R. Corp. v. Washington County, Iowa*, 384 F.3d 557, 559 (8th Cir. 2004) (trial court's finding of non-preemption under ICCTA affirmed; plaintiff railroad's argument "ignores relevant federal statutes that were enacted before ICCTA, that are administered by one or more agencies other than the ICC or STB, and that Congress left intact in enacting ICCTA.").

Consequently, the Board's statement that "every court" that has ruled on ICCTA preemption has found that it "blocks actions" by non-federal authorities is incorrect as a matter of law. Decision at 7.

The Decision also erroneously states that courts have "uniformly concluded" that the ICCTA's preemption provision is not limited to "direct state and local economic regulation." A number of federal circuits have, in fact, reached the opposite conclusion. *See, e.g., Tyrrell*, 248 F.3d at 522–23; *Florida E. Coast Ry. Co. v. City of W. Palm Beach*, 266 F.3d 1324, 1337 (11th Cir. 2001) (ICCTA was focused on "removing direct economic regulation by the States, as

[2] The Board has also noted that "[s]ection 10501(b) need not be read to preempt valid regulation under [other federal statutes] where regulation under these statutes, fairly enforced, does not unreasonably interfere with railroad operations." *Boston & Maine Corp.*, STB Fin. Dkt. No. 33971, 2001 STB LEXIS 435 (May 1, 2001), at n.28.

opposed to the incidental effects that inhere in the exercise of traditionally local police powers").[3]

The Decision here also fails to distinguish other Board precedent. *See Green Mountain Railroad Corporation—Petition for Declaratory Order*, STB Finance Docket No. 34052 (STB served May 28, 2002). The Decision never discusses *Green Mountain*, which was cited by the District for the proposition that the Board should deny a railroad's request for declaratory order where that railroad had also requested judicial relief from federal district court. *Id*. at 4. Here, CSXT filed for judicial relief less than two weeks after it filed its petition before the Board, but the Decision does not even cite *Green Mountain*, and thus contains no indication why the Board denied the request for a declaratory order in that case but granted it here on an expedited schedule. "We will not attempt here to analyze any particular ordinances or local regulatory requirements; the review of individual ordinances or state or local regulations is beyond the scope of our limited inquiry in this case and is more appropriately an issue for the courts." *Auburn & Kent, WA—Petition For Declaratory Order*, 2 S.T.B. 330, 1997 STB LEXIS 143

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[3] *See also id.* at 1338 n.11:

> [Plaintiff]'s claim of pre-emption is based essentially on the supposed interference of West Palm Beach with the railroad's efficient allocation of its resources . . . . This microeconomic focus is not consistent with the stated purposes of the ICCTA. In reducing the regulation to which railroads are subject at state and federal levels, the ICCTA concerns itself with the efficiency of the industry as a whole across the nation. No statement of purpose for the ICCTA, whether in the statute itself or in the major legislative history, suggests that any action which prevents an individual firm from maximizing its profits is to be pre-empted. Naturally, at some level, all regulation places constraints on firms' profit-maximizing behavior; to allow [plaintiff]'s argument to prevail would subsume all local regulation to the profit-maximizing priorities of individual railroad companies. The nationwide efficiency of the railroad industry, however, may still be preserved without necessarily denying the possibility of all local regulation.

Id. (*citing Hayfield N. R.R. Co. v. Chicago & Northwestern Transport. Co*., 467 U.S. 622, 635-36 (1984) (unanimous decision)) (additional citations omitted).

(1997), at *12, *affirmed, City of Auburn v. United States*, 154 F.3d 1025 (9th Cir. 1998), *cert. denied*, 527 U.S. 1022 (1999))

The Decision Erroneously Concludes that the District Law will Lead to "Copycat" Legislation.

Finally, the Decision makes the fundamental erroneous assumption made by CSXT and the other commenters—that the Terrorism Prevention Act would "likely" lead to other jurisdictions enacting similar legislation. Decision at 11. In addition to being sheer speculation, that assumption is unsupported by the record.

As the District has previously noted, it is unique. The risk that the District seeks to avoid here is the risk of intentional, terrorist attack by the targeting of regular shipments of hazardous materials that pass within blocks of the U.S. Capitol. Because the District of Columbia is under a *unique* risk of such an attack, the rerouting of the covered materials here to other areas would effectively *eliminate* that risk, not shift it elsewhere.

The federal government acknowledges the unique nature of the threat faced by the District. *See, e.g.*, Department of Homeland Security, Enhanced Security Procedures for Operations at Certain Airports in the Washington, D.C., Metropolitan Area Flight Restricted Zone, 50 Fed. Reg. 7150, 7152–53 (Feb. 10, 2005) ("Because of its status as home to all three branches of the Federal government, as well as numerous Federal buildings, foreign embassies, multinational institutions, and national monuments of iconic significance, the Washington, DC, Metropolitan Area continues to be an obvious high priority target for terrorists.").

The USDOT has also explicitly acknowledged the unique nature of the District. The District of Columbia Department of Transportation ("DDOT") issued a report last year entitled

"District of Columbia Motor Carrier Management and Threat Assessment Study" (Aug. 2004).[4] DDOT commissioned the study underlying that report from the USDOT's Volpe National Transportation Systems Center. *Id*. at ES.1. The USDOT study explicitly recommended that the District "[d]evelop a set of truck routes to . . . improve security by barring large trucks from sensitive areas of the city, especially around the National Mall." *Id*. at ES.8. The study also proposed three different categories of roadways, including "Restricted roadways" which "are located in the area surrounding the U.S. Capitol and the White House[,] an area with *unique security concerns* . . ." *Id*. (emphasis added).

CSXT, by voluntarily rerouting some hazardous materials for almost a year, Decision at 3, has implicitly conceded that the District is under a unique, credible threat of a terrorist attack. The record is barren of any evidence that CSXT (or any other shipper) has rerouted hazardous material traffic around *any other* jurisdiction; that clear implication is that no other place faces the threat of terrorist attack on hazardous material shipments faced by the District.

Other jurisdictions therefore do not face the magnitude or type of risk faced by the District here, and could *not* simply copy the unique legislation adopted by the District. Any other conclusion is rank speculation and, in the interests of fairness, the District must be allowed to present evidence on the "threats" faced by other jurisdictions that the Board has apparently considered in making its decision.

[4] Available at http://www.ddot.dc.gov/ddot/cwp/view,a,1249,q,609850.asp

Conclusion

In light of the above, the District respectfully requests that the Board reverse its previous finding of preemption or, in the alternative, vacate its Decision and exercise its discretion to decline to issue the requested declaratory order.

DATE: March 22, 2005

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that copies of the foregoing Petition for Reconsideration of the District of Columbia were delivered by facsimile and by U.S. Mail, postage prepaid, this 22nd day of March, 2005, to:

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